Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

HELEN VAN ANDERSON

Petitioner,

v.

STATE OF MISSOURI

Respondent.

ON WRIT OF CERITIORARI TO THE
MISSOURI COURT OF APPEALS,
SOUTHERN DISTRICT

PETITION FOR A WRIT OF CERTIORARI

THOMAS D. CARVER
COUNSEL OF RECORD
CARVER & CANTIN
901 St. Louis Street
Suite 1600
Springfield, MO 65806
(417) 863-9303

DEE WAMPLER
2974 E. Battlefield
Springfield, MO 65804
(417) 882-9300

Attorneys for Petitioner
Helen Van Anderson

QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court declared that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. In *Davis v. Washington*, 126 S.Ct. 2266 (2006) the Court determined that hearsay statements are testimonial when the primary purpose of the statement is to establish or prove past events that are potentially relevant to later criminal prosecution.

The question presented, which requires explanation in light of the above rulings, is

> Whether a court may exclude hearsay evidence consisting of a label on over-the-counter, sealed medications offered to prove the unopened contents of a container when the unknown declarant or author of the label was unavailable and had not previously been cross-examined.

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceedings other than those listed in the caption.

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it is Nontestimonial Hearsay, Which is Admissible Because it Demonstrates Indicia of Reliability and is a "Firmly Rooted"Exception to the Hearsay Rule.

II. Some Circuits Have Continued to Rely on the Framework Advanced in *Ohio v. Roberts*, 448 U.S. 56 (1980) that Nontestimonial Hearsay is Admissible if it Bears Adequate Indicia of Reliability or Falls Within a "Firmly Rooted" Exception to the Hearsay Rule, Which is Contrary to the Court's Ruling in *Davis v. Washington*, 126 S.Ct. 2266. 2275 n 4., Where This Court Held That Nontestimonial Hearsay Did Not Violate the Confrontation Clause and Its Admissibility Should Be Governed by the Applicable Jurisdiction's Rules Of Evidence.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Helen Van Anderson respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Southern District, following a denial of petitioner's application for transfer by the Missouri Supreme Court.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 220 S.W.3d 454 (2007). The order of the court of appeals denying petitioner's motion for rehearing or transfer to the Missouri Supreme Court is unreported. (Pet. App. B). The order of the Missouri Supreme Court denying petitioner's application for transfer is unreported. (Pet. App. C).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2007, when the Missouri Supreme Court entered its order denying petitioner's timely filed application to transfer. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Introduction

This case presents an important and recurring question regarding the admissibility of hearsay in a criminal prosecution when the witness is unknown, unavailable for the trial of the defendant, and has not been examined previously by the defendant and hearsay testimony is being offered to prove the contents of sealed over-the-counter medications through the medications' label of contents. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court declared that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In *Davis v. Washington*, 126 S.Ct. 2266 (2006) the Court determined that hearsay statements are testimonial when the primary purpose of the statement is to establish or prove past events that are potentially relevant to later criminal prosecution. With regard to non-testimonial statements, some circuits have continued to utilize the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). *United States v. Mooneyham*, 474 F.3d 280, 286 (6th Cir. 2007); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006); *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006). Under *Ohio v. Roberts* nontestimonial statements do not offend the Confrontation Clause if they exist within a "firmly rooted" exception to the hearsay rule or if they are shown to be sufficiently reliable

because they are supported by "particularized guarantees of trustworthiness." *See* Roberts 448 U.S. 56, 66 (1980).

Here, the questions are two-fold: (a) Is a label on a common over-the-counter medication testimonial in nature, and (b) If the label is nontestimonial, must it meet the tests of "particularized guarantees of trustworthiness" or dwell in a "firmly rooted" exception to the hearsay rule in light of the rulings in *Crawford* and *Davis*, which significantly changed the law with regard to hearsay. Because this Court has not addressed this question or others flowing from it with regard to the Confrontation Clause requirements laid out in *Crawford v. Washington* 541 U.S. 36 (2004) and its offspring, it is worthy of consideration by the Court.

B. Factual and Procedural Background

On December 30, 2002, Helen Van Anderson was stopped near the city limits of Springfield, Missouri, for violating municipal traffic ordinances. (Trial Transcript, p. 201-202, hereinafter referred to by the letter "T." followed by the page number) Ms. Van Anderson had earlier been observed purchasing over-the-counter medications that authorities believed contained pseudoephedrine, a precursor chemical that can be used in the illegal production of methamphetamine. T. 203 Following the traffic stop, Officer Nash seized six boxes of "Target cold and allergy pills" bearing labels that listed pseudoephedrine among other ingredients. Petitioner's Appendix A, at 1a. At trial, the sealed, labeled boxes were admitted into evidence over Ms. Van Anderson's objection that the label information was impermissible hearsay, that the contents had never been tested for the presence of pseudoephedrine and that there was no proper foundation prior to admission. T. 208, 210, 212, 213, 219. No testing of any type was utilized to determine the nature of the substances in the boxes. T. 219-222.

On appeal, petitioner argued there was insufficient foundation to admit the labeled boxes that allegedly contained pseudoephedrine, and, further, after respondent in its brief argued that the so-called label exception to the hearsay rule permitted the admission of over-the-counter label statements on state's exhibits 1 and 3[1], petitioner argued in her reply that the rulings in *Crawford v. Washington*, 541 U.S. 36 (2004); and *Davis v. Washington*, 126 S.Ct. 2266 (2006) and followed in *State v. Justus*, 205 S.W.3d 872 (Mo. Banc, 2006) and *State v. March*, 216 S.W.3d 633 (Mo. Banc, 2007), made reliability irrelevant when the author of the label was unavailability and there could be no cross-examination.

The Missouri Court of Appeals, Southern District, disposed of the appeal by refusing to disturb the trial court's broad discretion to admit or exclude evidence. Petitioner's Appendix A. at 3a. In a concurring opinion Judge Scott found that label statements fell "within Crawford's discussion of non-testimonial hearsay" and, therefore, "was exempt from Confrontation Clause challenge." Petitioner's Appendix A, at 6a.

The court of appeals denied petitioner's timely filed motion for rehearing or, in the alternative, to transfer to the Missouri Supreme Court, on April 16, 2007. Petitioner's Appendix B, at 1b. On May 31, 2007, the Missouri Supreme Court denied petitioner's timely filed application to transfer pursuant to Rule 84.03 of the Missouri Rules of Civil and Criminal Procedure. Petitioner's Appendix C, at 1c.
This petition followed.

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[1] Exhibits one and three were the sealed, over-the-counter medication boxes with content labels in which the illegal substance was allegedly contained.

C. Reasons for Granting the Writ

The federal courts of appeal and state supreme courts continue to explore and struggle with the nature of testimonial and nontestimonial hearsay. As a result, some circuits are at variance with this Court, especially with regard to admissibility standards of reliability and other "firmly rooted" hearsay exceptions when at issue in the admissibility of nontestimonial hearsay statements.

Because there are many occasions over the course of time when parties to criminal litigation seek to admit hearsay evidence, it is important to resolve continuing disputes in federal and state courts arising out of *Crawford* and *Davis*. Also significant, is that the so-called "label exception," which the Missouri Court of Appeals seeks to legitimize as nontestimonial hearsay is neither a "firmly rooted" nor reliable exception to the hearsay rule and requires analysis by this Court in order to further define the limits of *Crawford* and *Davis*.

The Missouri Court of Appeals, Southern District, Decision Squarely Conflicts with this Court's Ruling in Davis v. Washington, 126 S.Ct. 2266.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 126 S.Ct. at 2273-2274.

Under this framework the package label identifying the contents of the over-the-counter medications in this case is clearly testimonial hearsay. It is equally apparent that there was no opportunity to cross-examine the author of the label, whose identity remains unknown.

Hearsay is testimonial if it is offered "...to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S.Ct. at 2274. Likewise, hearsay is testimonial as it applies to witnesses against the accused, that is those bearing testimony. *Id.* In turn, testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Id.*

Here, labels on the over-the-counter, cold medications seized from petitioner were offered to prove an element of the crime she was charged with – possession of the precursor chemical pseudoephedrine. No other evidence was offered to prove the contents of the seized packages.

Additionally, the chemical listings on the labels were not uttered in connection with an ongoing emergency or imminent danger. On the contrary, the label statements were voiced not to resolve a present emergency but, rather, to prove a past event relevant to the prosecution of Ms. Anderson, i.e. the chemical composition of the contents of the seized packages. *Id.* at 2276.

The Missouri Court of Appeals, Southern District, erred because it failed to conduct a *Crawford* and *Davis* analysis to determine whether labels on the sealed, over-the-counter medications seized from petitioner were testimonial in nature. Had the court engaged in this type of analysis there is substantial reason to believe they would have concluded the evidence was inadmissible because the

author of the label was unknown and unavailable and had not previously been subject to cross-examination.

There is Confusion Among the Circuits and State Supreme Courts as to Whether the Reasoning in Ohio v. Roberts, 448 U.S. 56 (1980), Remains Viable in Any Respect as to Nontestimonial Hearsay, Given the Rulings in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 126 S.Ct. 2266 (2006).

Regarding the admissibility of nontestimonial statements, some circuits have continued to utilize the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). *United States v. Mooneyham*, 474 F.3d 280, 286 (6th Cir. 2007); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006); *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006). Specifically, under *Ohio v. Roberts* nontestimonial statements do not offend the Confrontation Clause if they exist within a "firmly rooted" exception to the hearsay rule or if they are shown to be sufficiently reliable because they are supported by "particularized guarantees of trustworthiness." See Roberts 448 U.S. 56, 66 (1980).

However, FN 4 in Davis states:

> "Roberts condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " Crawford, 541 U.S., at 60, 124 S.Ct. 1354 (quoting Roberts), 448 U.S. at 66, 100 S.Ct. 2531). We overruled Roberts in Crawford by restoring the unavailability and cross-examination requirements.

The notation leads one to question whether nontestimonial statements are now admissible without a showing of trustworthiness or the presence of a firmly rooted hearsay exception. The Sixth Circuit in *United States v. Mooneyham*, 473 F.3d 280, 287 (6th Cir. 2007) adhered to the *Roberts* standard as did the ( )urt in *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006). Also, in *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) the 7th Circuit noted that *Davis* appears to vitiate *Roberts* applicability to nontestimonial hearsay.

This Court's attention to the uncertainty present in *Davis* as it relates to nontestimonial hearsay would benefit inferior courts across the country and bring needed clarity to the dimensions of the Confrontation Clause.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

Thomas D. Carver
Counsel of Record
CARVER and CANTIN
901 St. Louis St. Ste. 1600
Springfield, MO 65806
(417) 831-6363

Dee Wampler
Law Offices of Dee Wampler
2974 E. Battlefield
Springfield, MO 65804
(417) 882-9300

Attorneys For Petitioner

October 24, 2007

APPENDIX - OPINION OF THE MISSOURI COURT OF APPEALS FOR THE SOUTHERN DISTRICT DECIDED APRIL 03, 2007

IN THE
MISSOURI COURT OF APPEALS
for the Southern District

No. 27646

STATE OF MISSOURI

Respondent

v.

HELEN VAN ANDERSON

Appellant

Appeal From the Circuit Court of Greene County
Honorable Calvin R. Holden, Judge

Before Rahmeyer, P.J., Parrish and Soctt, JJ.

AFFIRMED

PER CURIAM. Defendant was convicted of possessing the methamphetamine[1] precursor pseudoephedring — specifically six packages of Target cold and allergy pills – with intent to manufacture meth. The pills were never tested; the sealed packages never opened. Defendant thus claims there was insufficient proof the packages contained pseudoephedrine or that she possessed the substance. We view the record most favorably to the verdict. *State v. Lloyd*, 205 S.W.3d 893,898 (Mo.App. 2006).

[1] Hereafter, and commonly known as, "meth."

Since pseudoephedrine is a key ingredient or "precursor" for meth-making, our laws limit the purchase and sale of over-the-counter medicines containint it.2 After Defendant made a suspicious purchase, Target store security called the police, who stopped and ultimately arrested Defendant. She made several incriminating statements, later admitted at trial. She indicated she had used meth; she knew pseudoephedrine was used to make meth; and she knew Target limited how much pseudoephedrine one person could buy. She brought her 11-year-old child to the store, and they tried to buy three boxes each. Target refused to sell the child pseudoephedrine, but Defendant somehow managed to buy all six packages herself. Defendant told the police something to the effect "I guess you're going to take me tojail today." She said she planned to trade or sell the pseudoephedrine to soneome in Jasper County who would use it to make meth. Defendant does not challenge the admission of this evidence.

Defense counsel objected at trial to the pill packages or evidence they contained pseudoephedrine based on their labeling,

> because there's no scientific -- there's been no examination whatsoever whether or not they do contain pseudoephedrine...[T]he lack of scientific tests or qualified testimony that these pills themselves contain pseudoephedrine. I mean, there's been no examination to say that they contain pseudoephedrine. The only reason that you dan say that they contain pseudoephedrine is that it appears on the box, it says 60 milligrams of pseudoephedrine.

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[2] See RSMo. §§ 195.417 (over-the-counter sales of methamphetamine precursor drugs), 195.418 (retail sales of methamphetamine precursor drugs).

> I am objecting based on that because the boxes coming in contain statements concerning pseudoephedrine on the box and which is hearsay, because I can't cross-examine the box. There is no foundation being laid as to whether or not the plls, in fact, do contain pseudoephedrine which I think is an essential burden of the state to show that, since it is a key element in this, that they show it does contain pseudoephedrine and not just based on hearsay.

The objection was overruled and the unopened pill packages were admitted into evidence and shown to the jury. A police witness later read from a package label in his testimony, and the packages were sent to the jurors on request during deliverations.

Defendant was convicted, and sentenced to eighteen months in prison and a fine. Her appeal renews her challenge to admission of the pill packages, and to their labels as proving she posssessed pseudoephedrine.[3]

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[3] Defendant's multifarious point relied on "makes the entire judgment one error and lists multiple crounds therefor, the result is that the point contains multiple legal issues. Seprate issues should be stated in separate points relied on." *Helmig v. State*, 42 S.E.3d 658 666-67 n.1 (Mo. App. 2001). Thus Defendant arguably preserved nothing for appellate review. *State v. Daggett*, 170 S.W. 3d 35, 42 (Mo.App. 2005). But we would rather decide cases on their merits, and by considering Defendant's argument as well, we can determine she is claiming, at bottom, that the State failed to show she possessed pseudoephedrine because "there was no testimony that the pills in the boxes were examined to detect the presence of pseudoephedrine,: and "the testimony of a cheist or such other prson qualified by scientific training to identify controlled substances" was needed to make a submissible case.

A trial count has broad discretion to admit or exclude evidence at trial. We will not disturb its ruling unless the court clearly abused its discretion. Further, we review for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *State v. Naasz*, 142 S.W.3d 869, 878 (Mo.App. 2004). the record reflects Defendant told police she knew she was buying pseudoephedrine, and fully meant to do so, because she planned to pass it along to Jasper County meth-makers. Given this evidence, we cannot find that admitting the packages themselves was error or prejudicial. Defendant's Confrontation Clause argument, first raised in her reply brief, comes to late and is waived. *Security Bank v. Dooms*, 884 S.W.2d 710,711 (Mo.App, 1994). We affirm the judgment.

SCOTT, J — CONCURS IN SEPARATE OPINION

No. 27646

STATE OF MISSOURI

Respondent

v.

HELEN VAN ANDERSON

Appellant

Appeal From the Circuit Court of Greene County

Honorable Calvin R. Holden, Judge

CONCURRING OPINION

I fully concur. I write only to dispel any notion that we should grant plain error review on the Confrontation Clause issue based on the recent *March* case,[1] or that our result would be different if we did. In *March*, our supreme court held a notarized laboratory test report, specifically created at law enforcement's request for prosecution purposes and offered in lieu of the analyst's live testimony, was a "core" testimonial statement subject to Confrontational Clause requirements.

[1] State v. March, No. SC87902, slip op. (Mo. March 20, 2007).

These pill packages are significantly different from the report in *March*. Several courts have allowed similar packaging to be admitted in meth precursor prosecutions,[2] and one of those also considered a Confrontation Clause challenge. "It seems clear to us that the author of the label on the non-prescription, over-the-counter medication at issue here, was not a 'witness against the accued.' Thus, the statements on the labels, though hearsay, would nevertheless fall within *Crawfords's*[3] disussion of non-testimonial hearsay." *Burchfield v. State*, 892 So.2d 191,202 (Miss. 2004). As such, the non-testimonial hearsay was exempt from Confrontation Cause challenge. *Id*. the same reasoning applies here.

/s/Daniel E. Scott, Judge

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[2] *See, e.g. Reemer v. State*, 835 N.E.2d 1005 (Ind.. 2005); *Burchfield v. State*, 892 So.2d 191 (Miss 2004); *State v. Heuser*, 661 N.W.2d 157 (Iowa 2003); *Shaffer v. State*, 184 S.W.3d 353 (Tex.App. 2006); *Brand v. State*, 941 So.2d 318 (Ala. crim. app. 2006); *People v. Shevock*, 782 N.W. 2nd 929 (Ill. app. 2003). these cases hold that contemporary food and drug regulation and pharmaceutical practice render medicine labels inherently accurate and trustworthy.

[3] *Crawford v Washington*, 541 U.S. 36 (2004).

MISSOURI COURT OF APPEALS
for the Southern District

No. 27646

STATE OF MISSOURI

Respondent

v.

HELEN VAN ANDERSON

Appellant

ORDER

Now on this 23rd day of Spril, 2007, the Court, having fully considered Appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer.

cc: Thomas D. Carver
Jayne T. Woods

IN THE SUPREME COURT OF MISSOURI

SC88508
SD27646

May Session, 2007

State of Missouri,

Respondent,

vs. (Transfer)

Helen Van Anderson,

Appellant.

Now on this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the sam is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2007, in the above entitled cause.

Given under my hand and seal of said
Court, at the City of Jefferson, this
29th day of May, 2007.

/s/ Thomas F. Simon, Clerk

MISSOURI COURT OF APPEALS
Southern District

No. 27646

Circuit Court Case No. 304CF3148

STATE OF MISSOURI

Respondent

v.

HELEN VAN ANDERSON

Appellant

MANDATE

APPEAL FROM THE CIRCUIT COURT
OF GREENE COUNTY

On this day, the Court, being sufficiently advised of and concerning the premises, does consider and adjudge that the judgment rendered herein by the Circuit Court of Greene County be in all things affirmed and stand in full force and effect, and that respondent recover of appellant costs and charges herein expended and have execution therefor.

Opinion Filed.

In testimony Whereof, I have hereunto set my hand and affixed the seal of the Missouri Court of Appeals, Southern District, at my office in the City of Springfield this 31st day of May, 2007.

/s/Sandra L. Skinner, Clerk